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and Brian Butcher

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

MOHAMAD ALI SAID, an individual,  
Plaintiff,

v.

COUNTY OF SAN DIEGO; DEPUTY  
SHERIFF PATRICK LOPATOSKY;  
DEPUTY SHERIFF BRIAN BUTCHER;  
DEPUTY SHERIFF LEE SCOTT; and  
DOES 1 - 50, inclusive,  
Defendants.

No. 12-cv-2437-GPC(RBB)

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT

Date: April 10, 2015  
Time: 1:30 PM  
Dept.: 2D - Courtroom of the  
Honorable Gonzalo P. Curiel  
Trial Date: None

**I**

**INTRODUCTION**

Plaintiff Mohamad Ali Said brings this action against two Sheriff's deputies, Patrick Lopatosky ("Lopatosky") and Brian Butcher ("Butcher"), and the County of San Diego ("County"), alleging he was unlawfully arrested and subjected to excessive force in violation of California state law and the United States Constitution when he was arrested in January 2012 for violation of a protective order held by his wife. Plaintiff contends he suffers from ongoing emotional distress and physical injury to his elbow as a result of the incident.

Defendants are entitled to partial summary judgment of the claims set forth in Plaintiff's Second Amended Complaint ("SAC") on the following grounds:

1 judgment on the following grounds:

2 1. Plaintiff has no evidence to support a claim against the County of San Diego  
3 for violation of 42. U.S.C. § 1983 (“§ 1983”). In particular, Plaintiff has no evidence that  
4 an “action pursuant to official municipal policy” or a failure to train amounting to  
5 deliberate indifference to individuals’ constitutional rights was the “moving force”  
6 behind his alleged injury.

7 2. Plaintiff cannot prevail on his § 1983 claim against Deputies Butcher and  
8 Lopatosky based on unlawful arrest or his corresponding state law claim for false arrest  
9 because he was arrested pursuant to probable cause. Additionally, Deputies Butcher and  
10 Lopatosky are entitled to qualified immunity as to Plaintiff’s § 1983 claim based on  
11 unlawful arrest.

12 3. Plaintiff cannot prevail on his § 1983 claim against Deputies Butcher and  
13 Lopatosky based on inadequate medical care because he cannot establish the Deputies  
14 were deliberately indifferent to his serious medical needs. Rather, the undisputed  
15 evidence demonstrates that the Deputies immediately summoned the necessary medical  
16 assistance. Additionally, Deputies Butcher and Lopatosky are entitled to qualified  
17 immunity as to this claim.

18 4. Plaintiff cannot prevail on his § 1983 claim against Deputies Butcher and  
19 Lopatosky based on malicious prosecution because there was, at a minimum, probable  
20 cause to arrest Plaintiff for violation of the protective order held by his wife.  
21 Additionally, Plaintiff has no evidence that the prosecution was initiated with malice or  
22 that either Deputy Lopatosky or Deputy Butcher took any action to compromise the  
23 prosecutor’s independent judgment, and thus he has no evidence to overcome the  
24 presumption set forth in *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981).

25 5. Plaintiff cannot prevail on his claim for violation of California Civil Code §  
26 52.1 because, the undisputed facts demonstrate that Plaintiff can prove no constitutional  
27 violation based on unlawful arrest, inadequate medical care, or malicious prosecution,  
28 and the only other constitutional violation Plaintiff alleges – excessive force—cannot in

1 and of itself, also comprise an alleged constitutional interference that gives rise to  
 2 liability under § 52.1. The alleged conduct must be shown to have been committed for  
 3 the purpose of interfering with some other constitutional right.

## 4 II

### 5 STATEMENT OF UNDISPUTED FACTS

6 On June 16, 2009 a domestic violence misdemeanor complaint was filed against  
 7 Plaintiff in the Superior Court of California, County of San Diego, East County Division,  
 8 alleging three counts for: 1) Corporal Injury to Spouse and/or Roommate, Penal Code  
 9 Section 17(b)(4); 2) Battery of a Current or Form Significant Other, Penal Code Section  
 10 243(e)(1) and 3) Battery, Penal Code section 242, alleging the use of force and violence,  
 11 and the infliction of injury on his spouse, Walaa Said, aka Walaa Alqershi. (Separate  
 12 Statement of Undisputed Material Facts (“SSUF”) No. 11).<sup>1</sup> A Criminal Protective Order  
 13 against Plaintiff in favor of Walaa Said as the protected person was issued on July 13,  
 14 2009. (SSUF No. 12). On March 24, 2010, a jury found Plaintiff guilty of the crime of  
 15 Battery of a Significant Other in violation of Penal Code section 243(e)(1), and Simple  
 16 Battery in violation of Penal Code section 242 for a domestic violence incident involving  
 17 his wife. (SSUF No. 13).

18 Plaintiff was sentenced to, among other things, three years of summary probation,  
 19 a condition of which was compliance with a criminal protective order that prohibited  
 20 Plaintiff from having any personal, electronic, telephonic, or written contact with Ms.  
 21 Alqershi or from coming within 100 yards of her. (SSUF No. 14). The protective order  
 22 also required Plaintiff to stay away from Ms. Alqershi’s home, employment, or vehicle.  
 23 (SSUF No. 14). The protective order was to expire on May 23, 2013. (SSUF No. 15).  
 24 Plaintiff was plainly informed of the meaning of the protective order at his sentencing  
 25 hearing and at that hearing was clearly admonished by Judge Roderick Shelton that only  
 26 the Court could rescind the order and that no contact with Ms. Alqershi meant absolutely  
 27

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28 <sup>1</sup> Defendants cite only to the SSUF, and not all the evidence in support thereof, to  
 avoid lengthy citations in the brief. Detailed citations to the evidence can be found in the

1 no contact. (SSUF No. 16). Plaintiff had an Arabic interpreter at his trial and sentencing  
2 and Plaintiff admitted in his deposition that he understood the terms of his sentence.  
3 (SSUF No. 17).

4 At some point subsequent to Plaintiff's criminal sentencing, Ms. Alqershi became  
5 pregnant with Plaintiff's second child, a daughter, to whom she gave birth on October 1,  
6 2011. (SSUF No. 18). On January 24, 2012, at approximately 5:50p.m., the Sheriff's  
7 Department communications center received a 911 call from a woman identifying herself  
8 as Walaa Alqershi. (SSUF No. 19). Ms. Alqershi indicated, among other things, that she  
9 had a restraining order against her husband, but she was living with him and that he was  
10 driving her crazy, and she was afraid he was going to kill her. (SSUF No. 19). Ms.  
11 Alqershi requested law enforcement assistance and while on the phone, she indicated she  
12 was leaving her house located at 3755 El Canto Dr. and was walking to her neighbor's  
13 house located at 3725 El Canto Dr. (SSUF No. 19).

14 Deputies Butcher and Lopatosky were on patrol on the evening of January 24,  
15 2012, and received a radio call to respond to 3755 El Canto Dr., Spring Valley, California  
16 to contact an individual who may have been "5150", in other words, a person who, as a  
17 result of a mental health disorder, is a danger to others, or to himself or herself, or is  
18 gravely disabled. (SSUF No. 20). At some point the address for the call was changed to  
19 3725 El Canto Dr. - a house a couple of houses down from the original address. (SSUF  
20 No. 20). Psychiatric Emergency Response Team ("PERT") clinician, Cynthia Van Lom,  
21 was assigned to work with Deputy Butcher and was riding with him in his patrol vehicle.  
22 (SSUF No. 21). Deputy Butcher and Ms. Vam Lom arrived at 3725 El Canto Dr. first,  
23 and made contact with the reporting party, Walaa Alqershi. (SSUF No. 22). They  
24 determined that Ms. Alqershi was not "5150" but was upset with her husband. (SSUF  
25 No. 23). Deputy Butcher was aware that Ms. Alqershi and her husband had a history of  
26 domestic violence because he had arrested her husband for spousal abuse in violation of  
27 Penal Code 273.5(a) back in April 2009. (SSUF No. 23). Ms. Alqershi told Deputy

28 SSUF.

1 Butcher and Ms. Van Lom that she and Plaintiff had been living together, and that on that  
2 evening, Plaintiff had threatened to kill her and any cops that showed up if she called the  
3 cops on him. (SSUF No. 24). Ms. Alqershi wanted Plaintiff arrested. (SSUF No. 24).

4 Deputy Lopatosky arrived at the scene shortly Deputy Butcher. (SSUF No. 25).  
5 Deputy Butcher told him that he had spoken with Ms. Alqershi, and that he believed this  
6 was a violation of a restraining order call. (SSUF No. 25). Deputy Lopatosky took over  
7 as the primary deputy on the scene and also spoke directly to Ms. Alqershi. (SSUF No.  
8 26). She told Deputy Lopatosky that she and Plaintiff had been married for about 5  
9 years, that they currently live together, and have two children together, a four year old  
10 and a 3 month old. (SSUF No. 26). Ms. Alqershi indicated that she had been the victim  
11 of domestic violence by her husband about a year and a half earlier, and that as a result of  
12 that incident, a restraining order was issued against him, that he had been served with the  
13 order, and that he was not to be within 100 yards of her. (SSUF No. 27). Ms. Alqershi  
14 indicated that she had stayed at a shelter called Becky's House after the domestic  
15 violence incident but that after her stay at Becky's House, Plaintiff picked her up and  
16 they had been living together ever since, even though the restraining order was still in  
17 place. (SSUF No. 27). Ms. Alqershi told Deputy Lopatosky that on that evening, her  
18 husband had threatened to kill her, kill any responding law enforcement, and then kill  
19 himself, but that he had not done anything to her physically. (SSUF No. 28). Ms.  
20 Alqershi wanted Plaintiff arrested. (SSUF No. 28). Deputy Lopatosky also confirmed  
21 that while Ms. Alqershi appeared upset by the circumstances with her husband, she did  
22 not appear to be suffering from any type of mental health disorder. (SSUF No. 29).

23 Deputy Butcher conducted a records check through the Sheriff's inquiry channel,  
24 and the records check revealed there was an active domestic violence criminal protective  
25 order issued in case number C291668, listing Plaintiff as the restrained person, and Ms.  
26 Alqershi as the protected person. (SSUF No. 30). The deputies were informed through  
27 the records check that order was reported to have been served by Judge Shelton, and was  
28 set to expire on May 23, 2013, and that the terms of order prohibited Plaintiff from

1 having any contact with Ms. Alqershi. (SSUF No. 30). Based on the information they  
 2 were provided, Deputies Lopatosky and Butcher believed in good faith that Plaintiff was  
 3 in violation of the protective order. (SSUF No. 31).

4 Deputy Lopatosky and Deputy Butcher made contact with Plaintiff at 3755 El  
 5 Canto Dr. (SSUF No. 32). Plaintiff was handcuffed and complained of injury to his arm.  
 6 (SSUF No. 33). Deputy Butcher immediately summoned the Fire Department for  
 7 paramedic assistance. (SSUF No. 34). The paramedics arrived approximately five  
 8 minutes later and Plaintiff was taken via ambulance to the hospital for evaluation. (SSUF  
 9 No. 35).

### 10 III

### 11 ARGUMENT

#### 12 A. **Plaintiff's Municipal Federal Civil Rights Claim Fails** 13 **Because There Is No Evidence Of A County Policy, Custom, or Practice** **That Resulted In Any Constitutional Violation**

14 In support of his § 1983 claim against the County, Plaintiff alleges myriad  
 15 unlawful policies, customs and “habits”, for which he has no proof. Plaintiff claims the  
 16 County has “unlawful policies, customs and habits of improper and inadequate hiring,  
 17 training, retention, discipline and supervision of its sheriff’s deputies, proximately  
 18 causing the constitutional deprivations, injuries and damages alleged in the First Cause of  
 19 Action.”(Dkt. No. 23 SAC ¶ 39.) Plaintiff also alleges that the County has an unlawful  
 20 policy, custom or habit of permitting unlawful searches and seizures, false arrests and the  
 21 unnecessary and excessive use of force by sheriff deputies and failing to take action  
 22 against deputies who commit acts of excessive force. (*Id.* ¶ 40.) Plaintiff further  
 23 complains that the County has inadequate policies relating to “1) enlisting domestic  
 24 violence victims to participate in contacting and arresting domestic violence suspects. 2)  
 25 warrantless detentions and arrests of citizens for mere suspicions and without probable  
 26 cause, 3) use of excessive force by deputies, and 4) writing false police reports as a  
 27 method of covering up acts of excessive force and other improprieties by sheriff’s  
 28 deputies.” (*Id.* ¶ 41.) Plaintiff also alleges that County and its sheriff’s department “have



1 refused to investigate, or have inadequately investigated, numerous complaints of false  
 2 arrest, excessive force and unlawful searches and seizures made by citizens against its  
 3 sheriff's deputies over many years, including complaints that resulted in substantial jury  
 4 verdicts against the deputies and the County.” (*Id.* ¶ 42.)

5 In *Monell v. New York City Dept. of Social Services*, the Supreme Court  
 6 determined that the language of § 1983 and the legislative history of the statute  
 7 “compel[led] the conclusion that Congress did not intend municipalities to be held liable  
 8 unless action pursuant to official municipal policy of some nature caused a constitutional  
 9 tort.” *Monell v. N.Y. City Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978). Accordingly,  
 10 the Supreme Court held that those who seek to impose liability on local government  
 11 entities under § 1983 must prove that “action pursuant to official municipal policy” was  
 12 the “moving force” behind their injury. *Id.* at 691, 694. “Official municipal policy  
 13 includes the decisions of a government’s lawmakers, the acts of its policymaking  
 14 officials, and practices so persistent and widespread as to practically have the force of  
 15 law.” *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011). In limited circumstances, the  
 16 Supreme Court has also recognized that “a local government’s decision not to train  
 17 certain employees about their legal duty to avoid violating citizens’ rights may rise to the  
 18 level of an official government policy for purposes of § 1983.” *Id.* It is in these  
 19 circumstances that municipal liability is at its “most tenuous,” (*id.*) however, and the  
 20 standard for proving liability is strict: “the inadequacy of police training may serve as the  
 21 basis for § 1983 liability only where the failure to train amounts to deliberate indifference  
 22 to the rights of persons with whom the police come into contact.” *City of Canton v.*  
 23 *Harris*, 489 U.S. 378, 388 (1989). Additionally, “[a] pattern of similar constitutional  
 24 violations by untrained employees is ‘ordinarily necessary’ to demonstrate deliberate  
 25 indifference for purposes of failure to train.” *Connick*, 131 S. Ct. at 1360 (2011) *quoting*  
 26 *Bd. of the County Comm’Rs v. Brown*, 520 U.S. 397, 409 (1997).

27 The burden is on the plaintiff to present evidence that the allegedly  
 28 unconstitutional activities of the law enforcement officer were pursuant to “policy

statement, ordinance, regulation, or decision officially adopted and promulgated by [the entity's] officers.” *Monell*, 436 U.S. at 690. Defendant County is entitled to summary judgment of Plaintiff’s *Monell* claim because Plaintiff has been allowed an adequate opportunity to conduct discovery, and has ***no evidence*** to meet this burden. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In fact, when Plaintiff was asked in written discovery to state all facts in support of his various “unlawful policy, custom, or habit” allegations, he stated:

The facts of this case where several officer conspire to storm a citizen’s adobe arrest him without any probable cause and then break his elbow with the use of excessive force clearly unwarranted and then filing false reports and instigating false criminal proceedings that intended only to scare and coerce justice so that they escape punishment for what they did violating every oath and promise to protect the citizens they instead violated. After all this and you see all these officers protected by the County instead of being investigated and punished. If you were the victim of what I am claiming what would you describe the County system as? I know what has happened and if the officers has [sic] been investigated and remain free and unpunished then it must be the custom, policy or practice to ignore citizen’s complaints. San Diego County supported the officer’s request to file erroneous charges and dropping the charges when the coercion is about to be exposed. SD County is notorious for all aspects of these violations and if you simply do a google search of all these aggressive unlawful behaviors and demeanors of officers you will be surprised with the responses which will confirm our allegation.

(SSUF No 1-10). The above response merely restates the allegations of the complaint and contends a “google search” will provide evidence in support of Plaintiff’s *Monell* claim. This is clearly insufficient “evidence” to avoid summary judgment of Plaintiff’s 42 U.S.C. § 1983 municipal federal civil rights claim.

**B. Lopatosky and Butcher Are Entitled To Partial Summary Judgment On Plaintiff’s 42 U.S.C. § 1983 Claim**

Plaintiff alleges causes of action under § 1983 against Deputies Butcher and Lopatosky for false arrest, excessive force, falsifying police reports, denial of medical



1 attention and malicious prosecution.<sup>2</sup> Defendants contend they are entitled to summary  
 2 judgment on three of these five theories—false arrest, denial of medical attention, and  
 3 malicious prosecution.

4 **1. Deputies Lopatosky and Butcher Are Entitled to Summary**  
 5 **Adjudication of Plaintiff's § 1983 Claim For False Arrest Because**  
 6 **There Was Probable Cause to Arrest Plaintiff For Violation of the**  
 7 **Protective Order or Alternatively, Based on Qualified Immunity**

8 Deputies Lopatosky and Butcher are entitled to summary judgment as to Plaintiff's  
 9 § 1983 claim based on false arrest because the deputies were legally authorized to arrest  
 10 Plaintiff for violation of the protective order held by his wife. In order to prove a §1983  
 11 claim for unlawful arrest under the Fourth Amendment, Plaintiff must establish  
 12 Defendants lacked probable cause to arrest him. *See* Ninth Cir. Model Jury Instr. Civ.  
 13 9.20 ("In order to prove the seizure in this case was unreasonable, the plaintiff must  
 14 prove by a preponderance of the evidence that [he] [she] was arrested without probable  
 15 cause."); *see also Dubner v. City and Cnty. of San Francisco*, 266 F.3d 959, 964 (9th Cir.  
 16 2001) ("A claim for unlawful arrest is cognizable under § 1983 as a violation of the  
 17 Fourth Amendment, provided the arrest was without probable cause or other  
 18 justification."); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) (a  
 19 plaintiff must demonstrate the absence of probable cause to prevail on a § 1983 claim for  
 20 false arrest and imprisonment). Probable cause to arrest "exists where, under the totality  
 21 of the circumstances known to the arresting officers, a prudent person would have  
 22 concluded that there was a fair probability that the suspect had committed a crime." *Peng*  
 23 *v. Hu*, 335 F.3d 970, 976 (9th Cir. 2003) (internal quotations and brackets omitted); *see*  
 24 *also United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) ("Probable cause to  
 25 arrest exists when officers have knowledge or reasonably trustworthy information  
 26 sufficient to lead a person of reasonable caution to believe that an offense has been or is

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27 <sup>2</sup> On January 21, 2014, the Court issued an order dismissing Defendant Scott Lee  
 28 and Plaintiff's § 1983 claim based on equal protection. The Court also held that the SAC  
 did not plead a separate § 1983 claim for unreasonable search and seizure, but rather that  
 the alleged unreasonable search and seizure was pled as an element of Plaintiff's

1 being committed by the person being arrested.”) “A sufficient basis of knowledge is  
2 established if the victim provides facts sufficiently detailed to cause a reasonable person  
3 to believe that a crime has been committed and the named suspect was the perpetrator.”  
4 *Peng*, 335 F.3d at 978.

5 Here it is undisputed that Plaintiff’s wife, Ms. Alqershi, had an active domestic  
6 violence protective order against Plaintiff as of the date of the incident. The order  
7 provided that Plaintiff must not “harass, strike, threaten, assault....” Ms. Alqershi, that  
8 Plaintiff “must have no personal, electronic, telephonic, or written contact with” Ms.  
9 Alqershi, that Plaintiff must have “no contact” with Ms. Alqershi, that Plaintiff “must not  
10 come within 100 yards” of Ms. Alqershi, and that Plaintiff must stay away from Ms.  
11 Alqershi’s home, employment, and vehicle. Ms. Alqershi called 9-1-1 and reported that  
12 she needed help at 3755 El Canto Dr., that she had a restraining order against her husband  
13 Mohamad Said, but that she had gone back to him and was living with him at that  
14 address. She told the 9-1-1 dispatcher that she was afraid he was going to kill her  
15 because he told her that he would kill her and kill himself if she called the cops. Deputies  
16 Lopatosky and Butcher made contact with Plaintiff at a neighbor’s house two doors down  
17 at 3725 El Canto Dr., where she told the 9-1-1 dispatcher she would be waiting.  
18 Consistent with the information Ms. Alqershi had given to the dispatcher, Ms. Alqershi  
19 told the deputies that she and Plaintiff were living together and had two children together,  
20 a four year old and a 3 month old. Ms. Alqershi indicated that she had been the victim of  
21 domestic violence by her husband about a year and a half earlier, and that as a result of  
22 that incident, a restraining order was issued against him and that he was not to be within  
23 100 yards of her. Deputy Butcher was aware Ms. Alqershi and Plaintiff had a history of  
24 domestic violence because he had arrested Plaintiff for spousal abuse in violation of  
25 Penal Code 273.5(a) back in April 2009. Ms. Alqershi told the deputies that on that  
26 evening, Mohamad had threatened to kill her, kill any responding law enforcement, and  
27 then kill himself, and that she wanted Plaintiff arrested. The deputies confirmed with the  
28 \_\_\_\_\_  
excessive force cause of action.

1 Sheriff's Department, through the inquiry channel, that there was an active protective  
 2 order that prohibited Plaintiff from having any contact with Ms. Alqershi, and that  
 3 Plaintiff had been served with that order.

4 These facts are sufficient to demonstrate that there was probable cause to arrest  
 5 Plaintiff for an intentional and knowing violation of the protective order pursuant to  
 6 Penal Code Section 273.6(a), and under the authority of Penal Code Section 836(c)(1),  
 7 which provides:

8 When a peace officer is responding to a call alleging a  
 9 violation of a domestic violence protective or restraining order  
 10 issued under Section 527.6 of the Code of Civil Procedure, the Family  
 11 Code, Section 136.2, 646.91, or paragraph (2) of subdivision (a) of  
 12 Section 1203.097 of this code, Section 213.5 or 15657.03 of the  
 13 Welfare and Institutions Code, or of a domestic violence protective  
 14 or restraining order issued by the court of another state, tribe, or  
 15 territory and ***the peace officer has probable cause to believe that***  
 16 ***the person against whom the order is issued has notice of the order***  
 17 ***and has committed an act in violation of the order***, the officer  
 shall, consistent with subdivision (b) of Section 13701,<sup>3</sup> ***make a***  
***lawful arrest of the person without a warrant and take that person***  
***into custody whether or not the violation occurred in the presence of***  
***the arresting officer.***

18 Deputies Lopatosky and Butcher should be granted summary judgment as to  
 19 Plaintiff's § 1983 claim because Plaintiff's arrest was supported by probable cause, and  
 20 accordingly, did not violate the constitution.

21 Deputies Lopatosky and Butcher are further entitled to summary judgment of  
 22 Plaintiff's § 1983 claim based on unlawful arrest based on qualified immunity. The  
 23 defense of qualified immunity protects "government officials . . . from liability for civil  
 24 damages insofar as their conduct does not violate clearly established statutory or

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26 <sup>3</sup> California Penal Code § 13701 requires that "[e]very law enforcement agency in  
 27 this state shall develop, adopt, and implement written policies and standards for officers'  
 28 responses to domestic violence calls by January 1, 1986. These policies shall reflect that  
 domestic violence is alleged criminal conduct." Cal. Pen. Code. § 13701, subd., (a).  
 Section 13701 further states that "[t]hese policies also shall require the arrest of an  
 offender, absent exigent circumstances, if there is probable cause that a protective order. .

1 constitutional rights of which a reasonable person would have known.” *Harlow v.*  
 2 *Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity allows for errors in judgment  
 3 and protects “all but the plainly incompetent or those who knowingly violate the law . . .  
 4 [I]f officers of reasonable competence could disagree on the issue [whether or not a  
 5 specific action was constitutional], immunity should be recognized.” *Malley v. Briggs*,  
 6 475 U.S. 335, 341(1986). Qualified immunity is a legal issue to be decided by the court  
 7 at the earliest possible time in the litigation. *See Act Up!/Portland v. Bagley*, 988 F.2d  
 8 868, 872 (9th Cir. 1993). Resolving the issue of qualified immunity involves satisfying  
 9 either element of a two-step inquiry. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Pearson*  
 10 *v. Callahan*, 555 U.S. 223, 232-26 (2009). A court can either determine whether “[t]aken  
 11 in the light most favorable to the party asserting the injury, . . . the facts alleged show the  
 12 officer’s conduct violated a constitutional right,” or a court can evaluate whether the  
 13 constitutional right was “clearly established.” *See Saucier* 533 U.S. at 201; *Pearson*, 555  
 14 U.S. at 227. “If the law did not put the [officials] on notice that [their] conduct would be  
 15 clearly unlawful, summary judgment based on qualified immunity is appropriate.”  
 16 *Saucier*, 533 U.S. at 202.

17 As discussed above, the facts demonstrate that Plaintiff’s arrest was supported by  
 18 probable cause and thus do not support a finding that Defendants violated Plaintiff’s  
 19 rights under the Fourth Amendment, and accordingly, “there is no necessity for further  
 20 inquiries concerning qualified immunity.” *Saucier*, 533 U.S. at 201. However, even if  
 21 the Court were to find Plaintiff has alleged sufficient facts to plead a constitutional  
 22 violation in this case, the Deputies are nonetheless protected by the doctrine of qualified  
 23 immunity because a reasonable officer in each of their positions could have believed that  
 24 that probable cause existed to arrest Plaintiff based on Ms. Alqershi’s statements and the  
 25 Deputies’ verification of the protective order.

26 Thus, the court should apply qualified immunity here and grant summary judgment  
 27 in favor of Deputies Lopatosky and Butcher as to Plaintiff’s § 1983 claim based on

28 \_\_\_\_\_  
 .has been violated. *Id.* at § 13701, subd., (b)<sub>12</sub> -

1 unlawful arrest.

2 **2. Plaintiff Cannot Establish Deputies Lopatosky and Butcher Were**  
 3 **Deliberately Indifferent to His Medical Needs, or Alternatively,**  
 4 **the Deputies Are Entitled to Summary Adjudication of Plaintiff's**  
 5 **§ 1983 Claim Based on Inadequate Medical Attention Based on**  
 6 **Qualified Immunity**

7 “The due process clause requires responsible governments and their agents to  
 8 secure medical care for persons who have been injured while in police custody.”  
 9 *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1415 (9th Cir. 1986) (citing *City of*  
 10 *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)). The Due Process Clause of  
 11 the Fourteenth Amendment guarantees a pretrial detainee the right to receive adequate  
 12 medical care, and that right is violated if officials are deliberately indifferent to the  
 13 detainee’s serious medical needs. *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232,  
 14 1242–43 (9th Cir. 2010); *Revere*, 463 U.S. at 244-45. “Deliberate indifference is a high  
 15 legal standard.” *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). Deliberate  
 16 indifference exists when an official knows of and disregards a serious medical condition,  
 17 *i.e.*, when an official is “aware of facts from which the inference could be drawn that a  
 18 substantial risk of serious harm exists” and actually draws that inference. *Farmer v.*  
 19 *Brennan*, 511 U.S. 825, 837 (1994). A police officer’s constitutional duty can be fulfilled  
 20 “by either promptly summoning the necessary medical help or by taking the injured  
 21 detainee to a hospital.” *Maddox*, 792 F.2d at 1415 (citing *Revere*, 463 U.S. at 245);

22 This is exactly what the evidence demonstrates was done in this case. As soon as  
 23 Plaintiff complained his arm had been injured, Deputy Butcher immediately summoned  
 24 the Fire Department for paramedic assistance. The paramedics arrived approximately  
 25 five minutes later and Plaintiff was taken via ambulance to the hospital for evaluation.  
 26 Plaintiff cannot establish Deputies Lopatosky or Butcher were deliberately indifferent to  
 27 his medical needs.

28 Alternatively, Deputies Lopatosky and Butcher are entitled to qualified immunity  
 because a reasonable officer in each of their positions could have believed that

1 immediately requesting paramedic assistance for Plaintiff and causing Plaintiff to be  
 2 transported to the hospital via ambulance was sufficient to fulfill their constitutional  
 3 obligations. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (“[Q]ualified immunity shields  
 4 agents... if ‘a reasonable officer could have believed [the action] to be lawful, in light of  
 5 clearly established law and the information the [arresting] officer possessed.’” *quoting*  
 6 *Anderson*, 483 U.S. at 641; see also *Maddox*, 792 F.2d at 1415; *Revere*, 463 U.S. at 245;  
 7 *Tatum v. City & County of San Francisco*, 441 F.3d 1090, 1099 (9th Cir. Cal. 2006)(“a  
 8 police officer who promptly summons the necessary medical assistance has acted  
 9 reasonably for purposes of the Fourth Amendment”).

### 10                   3.    **Deputies Lopatosky and Butcher Are Entitled to Summary** 11                   **Adjudication of Plaintiff’s § 1983 Claim Based Malicious**                       **Prosecution**

12           Claims of malicious prosecution are generally not cognizable under § 1983 if a  
 13 remedy is available for such a claim within the state judicial system. *Usher v. City of Los*  
 14 *Angeles*, 828 F.2d 556, 561-62 (9th Cir. 1987). “However, an exception exists to the  
 15 general rule when a malicious prosecution is conducted with the intent to deprive a  
 16 person of equal protection of the laws or is otherwise intended to subject a person to a  
 17 denial of constitutional rights.” *Id.* at 562 (internal citations and quotations omitted).  
 18 Therefore, to prove a claim for malicious prosecution under § 1983, Plaintiff must: (a)  
 19 satisfy the requirements for a claim of malicious prosecution under California law; and  
 20 (b) demonstrate that the malicious prosecution was conducted with the intent to deprive  
 21 him of his constitutional rights. *See id*; see also *Freeman v. City of Santa Ana*, 68 F.3d  
 22 1180, 1189 (9th Cir. 1995) (plaintiff “must show that the defendants prosecuted [him]  
 23 with malice and without probable cause, and that they did so for the purpose of denying  
 24 [him] equal protection or another specific constitutional right.”). To establish a cause of  
 25 action for malicious prosecution under California law, Plaintiff must demonstrate “that  
 26 the prior action (1) was initiated by or at the direction of the defendant and legally  
 27 terminated in the plaintiff's favor, (2) was brought without probable cause, and (3) was  
 28 initiated with malice.” *Siebel v. Mittlesteadt*, 41 Cal. 4th 735, 740 (2007).



1 Plaintiff was charged with violation of Penal Code sections 69/17(b)(4), 273.6(a),  
 2 and 166(c)(1) in connection with the incident that is the subject of this lawsuit. As an  
 3 initial matter, as noted above, in section B.1, *supra*, there was, at a minimum probable  
 4 cause to arrest Plaintiff for violation of the protective order – which was charged by the  
 5 District Attorney’s Office as violation of Penal Code sections 273.6(a) and 166(c)(1).<sup>4</sup>

6 Even if the facts did not so clearly establish probable cause, however, the Ninth  
 7 Circuit has recognized that “[f]iling of a criminal complaint immunizes investigating  
 8 officers ... from damages suffered thereafter because it is presumed that the prosecutor  
 9 filing the complaint exercised independent judgment in determining that probable cause  
 10 for an accused’s arrest exists at that time.” *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir.  
 11 1981) (*Smiddy I*). In order to overcome this presumption, Plaintiff is required to produce  
 12 evidence that “the district attorney was subjected to unreasonable pressure by the police  
 13 officers, or that the officers knowingly withheld relevant information with the intent to  
 14 harm [him], or that the officers knowingly supplied false information.” *Smiddy v.*  
 15 *Varney*, 803 F.2d 1469, 1471 (9th Cir. 1986) (*Smiddy II*). A plaintiff’s contradictory  
 16 account of events, however, is not sufficient to overcome the presumption. *Newman v.*  
 17 *County of Orange*, 457 F.3d 991, 994 (9th Cir. 2006). “In the absence of evidence to  
 18 rebut the presumption, the presumption [is] sufficient to require summary judgment for  
 19 the defendants.” *Smiddy II*, 803 F.2d at 1471. Defendants are entitled to summary  
 20 judgment as to Plaintiff’s § 1983 claim based on malicious prosecution because he has no  
 21 evidence that either Deputy Lopatosky or Deputy Butcher took any action to compromise  
 22 the prosecutor’s independent judgment, and thus he has no evidence to overcome the  
 23 *Smiddy* presumption.

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26  
 27 <sup>4</sup> Defendants contend that there was additionally probable cause for Deputy  
 28 Lopatosky to cite Plaintiff with violation of Penal Code section 69—which was charged  
 by the District Attorney’s Office as a violation of Penal Code section 17(b)(4) for  
 Plaintiff’s attempt to kick him in the face and for Plaintiff’s resistance to arrest, but these

1 Plaintiff additionally has no evidence that the prosecution was initiated with  
 2 malice. Rather, the evidence supports a finding that there was probable cause for  
 3 Plaintiff's arrest.

4 **C. Defendants Are Entitled To Summary Judgment As To Plaintiff's**  
 5 **Claim For False Arrest/False Imprisonment.**

6 Plaintiff's complaint pleads a claim for false arrest against all of the Defendants  
 7 based on the same facts pled in support of his § 1983 claim for false arrest. California  
 8 law "protects a law enforcement officer from liability for false arrest . . . where the  
 9 officer, acting within the scope of his or her authority, either (1) effects a lawful arrest or  
 10 (2) has reasonable cause to believe the arrest is lawful." *Cervantes v. United States*, 330  
 11 F.3d 1186, 1188 (9th Cir. 2003); Cal. Pen. Code § 847(b). "An arrest is valid if  
 12 supported by probable cause." *People v. Kraft*, 23 Cal.4th 978, 1037 (2000). "Probable  
 13 cause to arrest exists if facts known to the arresting officer would lead a person of  
 14 ordinary care and prudence to entertain an honest and strong suspicion that an individual  
 15 is guilty of a crime." As set forth in section B.1, *supra*, Defendants Lopatosky and  
 16 Butcher are entitled to summary judgment as to Plaintiff's eighth cause of action for false  
 17 arrest because Plaintiff's arrest was supported by probable cause, and was thus "lawful"  
 18 under California law. For these same reasons, the County is likewise entitled to summary  
 19 judgment. *See* Cal. Gov't Code § 815.2.

20 **D. All Defendants Are Entitled To Summary Judgment As To Plaintiff's**  
 21 **Claim For Violation Of Civil Code § 52.1.**

22 As a fourth cause of action, Plaintiff alleges he is entitled to damages pursuant to  
 23 Civil Code § 52.1 for the Deputy Defendants' violation of his rights under the First and  
 24 Fourth Amendments, particularly the "acts of excessive force, unlawful detention, false  
 25 arrest and retaliation." (SAC ¶ 79).

26 "There are two distinct elements for a section 52.1 cause of action. A plaintiff must  
 27 show (1) intentional interference or attempted interference with a state or federal

28 \_\_\_\_\_  
 issues are factually disputed and are thus not raised herein.

1 constitutional or legal right, and (2) the interference or attempted interference was by  
 2 threats, intimidation or coercion.” *Allen v. City of Sacramento*, 2015 Cal. App. LEXIS  
 3 116, 40 (Cal. App. 3d Dist. Feb. 6, 2015); *see also Jones v. Kmart Corp.*, 17 Cal. 4th 329,  
 4 334 (1998)( “§ 52.1 requires an attempted or completed act of interference with a legal  
 5 right, accompanied by a form of coercion”). “The essence of a [Section 52.1] claim is that  
 6 the defendant, by the specified improper means (i.e., threats, intimidation[,] or coercion)  
 7 tried to or did prevent the plaintiff from doing something he or she had the right to do  
 8 under the law or to force the plaintiff to do something that he or she was not required to  
 9 do under the law.” *Shoyoye v. County of Los Angeles*, 203 Cal. App. 4th 947, 956 (2012)  
 10 (internal quotations and citations omitted). In other words, “[a] cause of action under the  
 11 [statute] requires a predicate—the application of threat, intimidation[,] or coercion and an  
 12 object—interference with a constitutional or statutory right.” *Rodriguez v. City of Fresno*,  
 13 819 F. Supp. 2d 937, 953 (E.D. Cal. 2011).

14 Defendants are also entitled to summary judgment on Plaintiff’s claim under 52.1  
 15 because Plaintiff cannot establish the predicate application of threat, intimidation or  
 16 coercion independent of that inherent in the constitutional violations he alleges that is  
 17 required of such a claim. *See e.g., Bender v. County of Los Angeles*, 217 Cal. App. 4th  
 18 968, 978 (2013) (Bane Act applied because “there was a Fourth Amendment violation—  
 19 an arrest without probable cause—accompanied by the beating and pepper spraying of an  
 20 unresisting plaintiff, i.e., coercion that is in no way inherent in an arrest, either lawful or  
 21 unlawful.”); *see also Shoyoye v. County of Los Angeles*, 203 Cal. App. 4th at 959 (where  
 22 the coercion alleged is only that which is inherent in the constitutional violation alleged,  
 23 the statutory requirement of “threats, intimidation, or coercion” is not met).

24 The undisputed facts offered in support of this motion demonstrate that Plaintiff  
 25 Plaintiff cannot establish a constitutional violation based on the theories of false arrest,  
 26 deliberate indifference to medical needs, or malicious prosecution, and the only other  
 27 constitutional violation Plaintiff alleges – excessive force—cannot in and of itself, also  
 28 comprise an alleged constitutional interference that gives rise to liability under § 52.1.

1 The alleged conduct must be shown to have been committed for the purpose of  
2 interfering with some other constitutional right.

3 **IV**

4 **CONCLUSION**

5 For the foregoing reasons, Defendants respectfully request that this Court issue an  
6 order granting partial summary judgment in favor of Defendants as requested herein.  
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8

9 DATED: February 23, 2015

THOMAS E. MONTGOMERY, County Counsel

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